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Representation for the Accused: Haiti's Thirst and a Role for Clinical Legal Education

Introduction	432
I. Creating and Implementing Our First Simulation Module....	444
A. Developing the Module.....	444
1. On Which Skills Should the Module Focus?	445
2. Assumptions About Client Interviewing: But, Does It Work That Way in the Haitian Criminal Justice System?.....	448
3. Resources.....	450
4. Trying to Respect Cultural Norms and Create a Simulation with Verisimilitude and Andragogical Integrity	451
B. Logistics and Implementation: Would the Ceiling Fall?.....	453
II. What We Learned that Might Translate to Other International Legal Clinical Endeavors: Roughly Hewn Guideposts	460

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A. Relying on Legal Academics/Practitioners On-Site and in Advance.....	460
B. Unearthing Assumptions	461
C. Acknowledging the Context-Specific Nature of Our Advice	461
D. Anticipating Pitfalls	463
E. Allowing a Bit of Chaos to Unfold, and, if Translation Is Necessary, Leaving Plenty of Time for That	464
F. Trying to Decipher Cultural Taboos	465
G. Garnering Good Will; Believing in, Supporting, and Celebrating the Students' Successes	465
H. Flexibility, the Silver Lining; Faith in the Value of the Clinical Education Process	466
III. Returning and Trying to Apply the Guideposts: The 2011 Module.....	466
Conclusion.....	469
Appendix A	471

INTRODUCTION

In 2011, the United States Supreme Court ruled that conditions in California's prisons constituted cruel and unusual punishment and violated the inmates' rights under the Eighth Amendment of the U.S. Constitution.¹ The Supreme Court perceived the situation as so grave that it upheld the district court's order mandating that California further reduce its prison population by approximately 37,000 prisoners.² The Supreme Court's ruling stemmed from a plethora of

¹ *Brown v. Plata*, 131 S. Ct. 1910, 1922 (2011) ("This case arises from serious constitutional violations in California's prison system. The violations have persisted for years. They remain uncorrected.").

² *Id.* at 1923 ("Although the State has reduced the population by at least 9,000 persons during the pendency of this appeal, this means a further reduction of 37,000 persons could be required. As will be noted, the reduction need not be accomplished in an indiscriminate manner or in these substantial numbers if satisfactory, alternate remedies or means for compliance are devised. The State may employ measures, including good-time credits and diversion of low-risk offenders and technical parole violators to community-based programs, that will mitigate the order's impact. The population reduction potentially required is nevertheless of unprecedented sweep and extent."). California passed legislation in 2011 that the California Department of Corrections and Rehabilitation describes as "the cornerstone of California's solution for reducing the number of inmates in the state's 33 prison[s] to 137.5 percent of design capacity by June 27, 2013, as ordered by the Three-Judge Court and affirmed by the U.S. Supreme Court." *The Cornerstone of California's Solution to Reduce Overcrowding, Costs, and Recidivism*, CAL. DEP'T OF

evidence documenting egregiously problematic conditions in the prisons. This evidence begins with the sheer number of inmates in relation to the space. The Court noted that the prison population was “nearly double the number that California’s prisons were designed to hold.”³ The district court had described the severe overcrowding as “forc[ing] prisons to house inmates in non-traditional settings, such as triple-bunks in gyms and dayrooms not designed for housing.”⁴ The Supreme Court noted that two to three correctional officers may supervise as many as 200 inmates in a gymnasium, a space not designed to house prisoners, and that “[a]s many as 54 prisoners may share a single toilet.”⁵

The conditions in California’s prisons as delineated in *Plata* are abysmal.⁶ As disturbing as these conditions are, I wonder what the Court might have ordered had the conditions in California’s prisons been as they have in Haiti’s. In reporting on conditions in Haiti, the U.S. Department of State’s 2009, 2010, and most recent 2011 Human Rights Reports concluded in similar, and sometimes identical, language in each year’s report that:

[p]risons and detention centers throughout the country remained overcrowded, poorly maintained, and unsanitary. Overcrowding was severe; in some prisons detainees slept in shifts due to lack of space. Some prisons had no beds for detainees, and some cells had no access to sunlight. Many prison facilities lacked basic services such as toilets, medical services, potable water, electricity, and medical isolation units for contagious patients Many prisoners and detainees suffered from a lack of basic hygiene, malnutrition, poor quality health care, and illness caused by lack of access to

CORR. & REHAB., <http://www.cdcr.ca.gov/realignment/> (last visited Aug. 19, 2012). The legislation, known as Realignment legislation (found in AB 109 and 117), became effective on October 1, 2011. *Id.* Generally, the legislation focuses on counties keeping and supervising individuals who have committed less serious offenses at the local level, rather than sending them to state prison. *Id.*

³ *Plata*, 131 S. Ct. at 1923.

⁴ *Coleman v. Schwarzenegger*, No. CIV S-90-0520, 2009 U.S. Dist. LEXIS 67943, at 142 (E.D. Cal. Aug. 4, 2009). In *Plata*, the Supreme Court described in graphic detail the disturbing results of California’s failure to remedy overcrowding and consequent failure to provide necessary medical and mental health care to the inmates of its prisons. Among other consequences, the Court pointed out that a 2007 “analysis of deaths in California’s prisons found 68 preventable or possibly preventable deaths.” *Plata*, 131 S. Ct. at 1925 n.4.

⁵ *Plata*, 131 S. Ct. at 1924.

⁶ I have had occasion to visit one of California’s prisons, San Quentin Prison in San Quentin, California, and did observe some of the effects of overcrowding there.

clean water. Some prisons did not allow prisoners out of their cells for exercise.⁷

With respect specifically to overcrowding, the 2011 State Department Report explains that “[a]ccording to local standards, available prison facilities were at 300 percent of their capacity, but by international standards, the prisons were above 500 percent of capacity.”⁸

In March of 2012, a law school group from the University of California, Hastings College of the Law, visited the prison in Jérémie, Haiti, and observed that there was no triple bunking in gymnasiums and dayrooms because there were no gymnasiums or dayrooms.⁹ In

7 U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: HAITI 5 (2011) [hereinafter 2011 HUMAN RIGHTS REPORT: HAITI]. The relevant passage from the 2009 Report reads:

Prisons and detention centers throughout the country remained overcrowded, poorly maintained, and unsanitary. Overcrowding was severe; in some prisons detainees slept and stood in shifts due to lack of space. Some prisons had no beds for detainees; some cells had no[] access to sunlight. Many prison facilities lacked basic services such as medical services, electricity, and medical isolation units for contagious patients. Many prisons also periodically lacked water. Many prisoners and detainees suffered from a lack of basic hygiene, malnutrition, and poor quality health care and illness caused by the presence of rodents. Some prisons did not allow prisoners out of their cells for exercise.

U.S. DEP’T OF STATE, 2009 HUMAN RIGHTS REPORT: HAITI, *available at* <http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136116.htm> [hereinafter 2009 HUMAN RIGHTS REPORT: HAITI]. The relevant passage from the 2010 Report reads:

Prisons and detention centers throughout the country remained overcrowded, poorly maintained, and unsanitary. Overcrowding was severe; in some prisons detainees slept in shifts due to lack of space. The earthquake, which damaged several prisons, intensified the existing problems. The earthquake damage compromised the holding capacity at facilities in Carrefour, Delmas, Jacmel, and the National Penitentiary in Port-au-Prince. Over 5,000 detainees escaped in the wake of the earthquake, including all 4,215 persons held at the National Penitentiary. Some prisons had no beds for detainees; some cells had no access to sunlight. Many prison facilities lacked basic services such as medical services, water, electricity, and medical isolation units for contagious patients. Many prisoners and detainees suffered from a lack of basic hygiene, malnutrition, poor quality health care, and illness caused by the presence of rodents. Some prisons did not allow prisoners out of their cells for exercise.

U.S. DEP’T OF STATE, 2010 HUMAN RIGHTS REPORT: HAITI, *available at* <http://www.state.gov/g/drl/rls/hrrpt/2010/wha/154509.htm> [hereinafter 2010 HUMAN RIGHTS REPORT].

8 2011 HUMAN RIGHTS REPORT: HAITI, *supra* note 7, at 5.

9 Escorted by Georges-Gabrielle Paul, an ESCDROJ graduate, I visited the Jérémie Prison with four other members of the 2012 Hastings-to-Haiti Partnership (HHP) on March 6, 2012. Our visit was brief. The Seton Hall Law School delegation also visited the prison the same week and conducted interviews with personnel associated with the prison and then prepared a fact-finding memorandum on the conditions there. *See* Seton Hall Law School Fact-Finding Memorandum from Rachel Lopez, Concerning Prison Conditions in

fact, there were no bunks or beds for adult male inmates at all.¹⁰ In general, these inmates slept in shifts on the concrete floor because there was not enough floor space for all the inmates to lie down at one time.¹¹ Adult male inmates primarily stood, sat, or squatted side-by-side with, in at least one cell, over fifty men packed into the cell with an official capacity of approximately ten men.¹² We learned that the adult male population of the Jérémie Prison had only limited access to toilets, which were located in the yard. According to a 2012 fact-finding memorandum on the Jérémie Prison from a Seton Hall School of Law delegation, “[t]ypically, prisoners have two to three breaks from their overcrowded cells per day, during which they have approximately 25 minutes to shower, use the toilet, and get whatever little exercise they can. When a prisoner needs to use the toilet and it is not break time, he must relieve himself into a communal bucket in the cell, which is collected and dumped each morning.”¹³

Jérémie and Recommendations for Reform (Apr. 18, 2012) (on file with the Review and with the author).

¹⁰ During the March 6, 2012, visit to the Jérémie Prison, I observed the intensely crowded conditions in adult male inmates’ cells, the absence of gymnasiums and dayrooms, and the lack of bunks and beds in cells with adult male inmates.

¹¹ The Seton Hall Memorandum notes, with respect to sleeping conditions in the prison, that the

prison warden explained that he cannot furnish the men’s cells with beds or mattresses because the roofs are made of aluminum and the prisoners could easily escape by using the mattresses to push up the roof. As a result, the prisoners must sleep on the floor. Sometimes the prison guards will place cardboard on the ground so the inmates do not have to sleep directly on the cold concrete floor.

Lopez, *supra* note 9, at 2.

¹² Lopez, *supra* note 9, at 1–2. When the HHP group visited the prison in March, we noticed the number fifty-seven chalked on a cell door, one that housed adult male inmates. This number was apparently intended to represent the count of inmates in the cell. We were, however, informed that the actual count of inmates in the cell was fifty-eight. Inmates in this cell stood, squatted, or sat almost on top of one another, occupying what appeared to be nearly every available square foot of floor space of the small dark room.

¹³ Lopez, *supra* note 9, at 2 (“The facility only has seven toilets and seven showers, which are located outside of the cells . . . The prison allows the prisoners two visits from their family members each week, but on those days they lose their regular break time.”). The HHP group did learn that, in at least some ways, the conditions in the Jérémie Prison had improved in recent years. For example, inmates now had regular access to water, which was apparently treated with chlorine or other disinfecting agents. *Id.* at 2–3. This access to water apparently resulted from funding by Seton Hall Law School and coordination with Dr. Eustache to have a well dug for the prison. *Id.* The cholera epidemic in Haiti, which began in October of 2010, has produced outbreaks in Haitian prisons, *see* 2011 HUMAN RIGHTS REPORT HAITI, *supra* note 7, at 6, and rendered the issue of the adequacy of medical care facilities in Haitian prisons especially urgent. In a July 18, 2012, website posting, the Center for Economic and Policy Research notes that the outbreak of

The observations of the March 2012 UC Hastings College of the Law group who visited the prison and the description in the Seton Hall 2012 fact-finding memorandum mirror many of the concerns about overcrowding and prison conditions articulated in the most recent 2011 U.S. State Department's Human Rights Report on Haiti.¹⁴ Similarly, the Health and Human Rights in Prisons Project in Haiti (HHRPP) opined in 2009 that "Haiti's prisons are among the worst detention facilities in the Americas."¹⁵

cholera in Haiti had caused 7,418 deaths and infected 579,014 people. *104 Members of Congress Call for the UN to Take Responsibility for Cholera*, CTR. FOR ECON. & POLICY RESEARCH (July 18, 2012), <http://www.cepr.net/index.php/blogs/relief-and-reconstruction-watch/104-members-of-congress-call-for-the-un-to-take-responsibility-for-cholera>; see *Health Cluster Bulletin: Cholera & Post-Earthquake Response in Haiti*, PAN AM. HEALTH ORG. (Dec. 21, 2011), available at http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_3209.pdf ("As of 30 November 2011, the cumulative number of reported cholera cases was 515,699, of which 279,077 (54%) were hospitalized and 6,942 persons had died."). When I visited the Jérémie Prison in 2012, there was a pool of what appeared to be bleach just outside the entrance to the prison into which we dipped the soles of our shoes to avoid spreading (cholera) germs. On March 6, 2012, at least one and perhaps two inmates seemed to be in the process of being treated for apparent cholera symptoms. One was walking about the yard in what appeared to be a disposable hospital gown and the other lay under a canopy on a cot in the otherwise open prison yard and appeared to be attached to a one-to-two gallon-sized jug of intravenous solution. The Seton Hall group, who visited the following day, reported that even though the well water was being treated in the Jérémie Prison, "four prisoners have had cholera and two have died since the outbreak of cholera in October 2010. Additionally, the week that the Seton Hall delegation visited, one of the prisoners was identified as possibly having cholera." Lopez, *supra* note 9, at 3.

¹⁴ As indicated in note 13, *supra*, some of the conditions in the Jérémie Prison (for example, access to water) may have been better than those in the prisons generally in Haiti as described in the 2009, 2010, and 2011 U.S. State Department Reports. The U.S. State Department Reports do note improvements in some of the conditions in Haitian prisons. See, e.g., 2010 HUMAN RIGHTS REPORT: HAITI, *supra* note 7, at 6 ("Authorities took some measures to improve prison conditions. In response to the prison killings in Les Cayes, Minister of Justice Paul Denis began a series of unannounced prison visits, beginning with the Women's prison in Petionville followed by the National Penitentiary. In addition, the government started releasing defendants who had been held in preventive detention for unacceptably long periods, pending formal charges and trial. Officials implemented a pilot project at the Petionville Women's Prison, establishing a special correctional tribunal to deal with the 257 detainees awaiting formal charges. Between June 8 and 14, the tribunal heard 15 cases, including three involving juveniles; 14 defendants were released, including an inmate who had served her sentence but remained incarcerated. The Ministry of Justice held hearings in August and September to reduce the pretrial detention backlog in the National Penitentiary, and the court committee released 30 inmates as a result. Still, since most of the 1,570 detainees awaiting trial in the Penitentiary were held for serious crimes that warranted a jury trial, they were effectively denied the right to a prompt trial. An estimated 15 percent of detainees in the National Penitentiary had been convicted by year's end.").

¹⁵ HEALTH AND HUMAN RIGHTS IN PRISONS PROJECT (HHRPP), INSTITUTE FOR JUSTICE & DEMOCRACY IN HAITI 3 (Dec. 2009), available at <http://ijdh.org/archives/5007>

Not only are the prison conditions deeply troubling, but they are accompanied by frequent failures to meet the Haitian legal requirement that suspects be brought before a judge within 48 hours following arrest.¹⁶ The 2009, 2010, and 2011 U.S. State Department Reports all explain, in similar language, that arrestees are often held in the jails and prisons for “extended periods—in some cases up to five years—without the opportunity to appear before a judge.”¹⁷ The

[hereinafter HHRPP]. Additional sources that describe the prison conditions in Haiti include the decision of the Inter-American Court in the *Yvon Neptune v. Haiti* case, where the court explained:

The Court also finds that it has been proved and not disputed that, during the time Yvon Neptune was detained in the National Penitentiary and subsequently in the Annex, there was a general context of serious shortcomings in prison conditions in Haiti, as well as a lack of security in almost all the country's detention centers; this was pointed out by several international organizations and agencies. There was extreme overcrowding, lack of beds, badly ventilated and unhygienic cells, few sanitary installations, poor food, a scarcity of drinking water, lack of medical attention and serious problems of hygiene, illnesses and bacterial diseases. The State did not dispute the Commission's allegations, according to which: “[t]he extreme overcrowding, unhygienic and unsanitary conditions and poor inmate diet at the National Penitentiary did not even approximate the standards set in the United Nations *Standard Minimum Rules for the Treatment of Prisoners*”; and “[d]espite repeated outbreaks of violence in the National Penitentiary, the State kept its inadequate structure intact.”

See *Yvon Neptune v. Haiti*, Merits Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), ¶ 137 (May 6, 2008) (footnotes and citations omitted), available at www.corteidh.or.cr/docs/casos/articulos/seriec_180_ing.pdf, and a submission to the United Nations Human Rights Council entitled REPUBLIC OF HAITI CRIMINAL JUSTICE—SUBMISSION TO THE UNITED NATIONS UNIVERSAL PERIODIC REVIEW, available at <http://ijdh.org/wordpress/wp-content/uploads/2011/03/UPR-Prisons-SR-English-Final.pdf>. Some sources report current or impending improvements in prison conditions in Haiti. See, e.g., Trenton Daniel, *Haitian Prisons Get Overhaul as Rest of Reconstruction Lags*, ASSOCIATED PRESS (July 21, 2011), <http://ijdh.org/archives/20289>.

¹⁶ 2011 HUMAN RIGHTS REPORT: HAITI, *supra* note 7, at 7–8, 10 (noting specifically that “[t]he law prohibits arbitrary arrest and detention, and the constitution stipulates that a person may be arrested only if apprehended during the commission of a crime or on the basis of a warrant by a legally competent official such as a justice of the peace or magistrate. Authorities must bring the detainee before a judge within 48 hours of arrest. Officials frequently did not comply with these provisions in practice The government frequently did not observe the constitutional requirement to present detainees before a judge within 48 hours, and prolonged pretrial detention remained a serious problem. Authorities held many detainees in pretrial detention for extended periods—in some cases up to five years—without the opportunity to appear before a judge.”).

¹⁷ 2011 HUMAN RIGHTS REPORT: HAITI, *supra* note 7, at 7–8; 2010 HUMAN RIGHTS REPORT: HAITI, *supra* note 7, at 8 (“The government frequently did not observe the legal requirement to present detainees before a judge within 48 hours, and prolonged pretrial detention remained a serious problem. Many detainees were held in pretrial detention for extended periods—in some cases up to five years—without being informed of charges against them.”); see also HHRPP, *supra* note 15, at 6. The HHRPP report describes results

most recent 2011 Report indicates that “most of the 4,808 pretrial detainees had never been before a judge, seen a lawyer, or even had access to documentation regarding the charges against them.”¹⁸ According to the Seton Hall memo, in Jérémie, there appear to be significant efforts underway to get pre-trial detainees before the court.¹⁹ Nonetheless, the memo indicates that, of the 243 adult male inmates in the prison on March 7, 2012, only seventy-five had been sentenced.²⁰ The remaining 168 still awaited trial, meaning more than two-thirds of the adult male inmates in the prison were pre-trial detainees who had not been convicted of the crime for which they sat, squatted, or stood in prison.²¹

These reports underscore the need for representation. Seeing a judge or being heard in the Haitian justice system may require the intervention of an attorney.²² For example, the 2012 Seton Hall fact-finding memorandum opines that “[a]fter 48 hours has passed, someone who has been arrested and not been before a judge may file a petition for habeas corpus, but that person needs a lawyer to represent him.”²³ An international human rights attorney familiar with prisons and legal services in Haiti explains, however, that: “[a]ccess to legal services is particularly problematic. Eighty percent of the population is desperately poor and cannot afford to pay [for] legal services. Despite the great need, Haiti lacks a tradition of organized public assistance lawyering.”²⁴ Similarly, the 2011 State Department

from its survey of prisoners on the length of detention as follows: “the average wait for trial for detainees in the HHRPP survey was 16 months, with one prisoner still waiting after nine years.” *Id.*

¹⁸ 2011 HUMAN RIGHTS REPORT: HAITI, *supra* note 7, at 11.

¹⁹ Lopez, *supra* note 9, at 1, 4.

²⁰ *Id.* at 3.

²¹ *Id.* There were approximately five women inmates during the March 2012 visit. The women inmates did have bunks and mattresses in the women’s cell, and so they were able to lie down without having to sleep in shifts. *Id.* at 2. Moreover, women were not confined to their cell during the day in the same way that the male adult inmates were confined. *Id.* Instead, the women seemed to have substantial access to the prison yard during the day.

²² *Id.* at 5.

²³ *Id.* (footnotes omitted).

²⁴ Blaine Bookey, *Enforcing the Right to be Free from Sexual Violence and the Role of Lawyers in Post-Earthquake Haiti*, 14 CUNY L. REV. 255, 274 (2011). Similarly, the 2011 State Department Report explains that “[m]any detainees could not afford the services of an attorney, and the government routinely did not provide free counsel.” 2011 HUMAN RIGHTS REPORT: HAITI, *supra* note 7, at 10. As described by a knowledgeable observer, most “Haitian law school graduates never become lawyers, because they fail to complete the required *memoire* (thesis) and *stage* (apprenticeship) required for admission to the bar. Students of modest means, those most likely to work on behalf of the poor, find

Report notes, "Many detainees could not afford the services of an attorney. The local bar association in some departments formed legal assistance groups to provide pro bono counsel to indigents who could

it particularly difficult to overcome these hurdles." Bookey, *supra* at 274. Similarly, Brian Concannon notes:

After finishing law school, graduates must present a memoire, or thesis. Technical support, access to materials, and advice for this process are not integrated into the curriculum, so students must find a lawyer willing to help them with their proposed topic, for a price. After successfully defending their memoire, candidates must complete a two-year stage or internship. Although some internships may be done in the public sector (in a courthouse, for example), the vast majority of candidates must find a senior lawyer in private practice who is willing to supervise them. As a result, although many students are enrolled in Haiti's six law schools, some motivated by the possibility of using the law for social change, [Mr. Concannon estimates that] fewer than twenty lawyers per year are admitted to practice . . . Haiti's legal education system is changing, but haltingly.

Brian Concannon, Jr., *Beyond Complementarity: The International Criminal Court and National Prosecutions, A View from Haiti*, 32 COLUM. HUM. RTS. L. REV. 201, 212 n.45 (2000). In addition, the Seton Hall fact-finding memo also opines that

[i]n Haiti, free legal assistance is nearly non-existent and . . . opportunities for pro se representation are extremely restricted." Lopez, *supra* note 9, at 7. On the topic of the availability of legal representation, Dr. Eustache explains: "In Haiti . . . [t]he scarcity of free legal services for lower income groups contributes greatly to the lack of legal knowledge. While the right to counsel is afforded to all citizens, court appointed counsel is generally only provided after the pretrial investigation is completed. In short, defendants are denied the right to legal advice during the most critical period of the proceedings.

Dr. Jomanas Eustache, *The Importance of Teaching Law and the Reinforcement of the Judiciary System in Haiti*, 32 HASTINGS INT'L & COMP. L. REV. 601, 609 (2009).

A significant development in providing free legal representation to prisoners has begun in a pilot project in prisons in Hinche, Mirebalais, and St. Marc, Haiti, under the auspices of the Health and Human Rights Project in Prisons. See HHRPP, *supra* note 15, at 7. A report on their work explains that "[t]he legal team represents prisoners at no charge to secure a dismissal of unjustified charges, and pre-trial release or a speedy trial where appropriate." *Id.* at 3. The HHRPP report notes that "[t]here is no effective system of legal aid in Haiti." *Id.* at 6. Moreover, the report contends, "Haiti's prisons are at the center of a nationwide bribery racket within the justice system." *Id.* at 6. Similar concerns about official corruption more generally also appear in the 2011 U.S. Department of State Human Rights Report, which maintains that "[t]he law provides criminal penalties for official corruption. However, the government did not implement the law effectively, and officials often engaged in corrupt practices with impunity. Corruption remained widespread in all branches and at all levels of government." 2011 HUMAN RIGHTS REPORT: HAITI, *supra* note 7, at 20.

Haiti is the poorest country in the Western Hemisphere. *The World Factbook, Haiti: Economy*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/ha.html> (last visited Oct. 13, 2012). The most basic human needs, for adequate food, potable water, and safe shelter, especially post-earthquake, are often not met. Many organizations and individuals are working to try to meet these and other threshold needs.

not afford an attorney, but there was no nationwide government provision of free legal representation.”²⁵ This need for representation produces an imperative to train and encourage attorneys to represent detainees in Haitian prisons.²⁶

At least one law school in Haiti aims to meet this imperative. ESCDROJ (*L'École Supérieure Catholique de Droit de Jérémie*, the Catholic Law School of Jérémie) focuses on “help[ing] build a society where the rule of law can be enforced”²⁷ and preparing law students “to become servants of law and justice.”²⁸ Approximately 130 students are enrolled in the four-year law school curriculum.²⁹ A law school dedicated to supporting the rule of law and to justice furnishes an excellent forum for encouraging students to undertake representation of prison detainees.

In U.S. legal education, especially in the decades since the 1992 MacCrate Report,³⁰ a law school would likely rely on a clinical

²⁵ 2011 HUMAN RIGHTS REPORT: HAITI, *supra* note 7, at 10; 2009 HUMAN RIGHTS REPORT: HAITI, *supra* note 7 (explaining that “[w]ith the support of the national government and the local legal community, international groups provided funds to indigent defendants for professional legal representation”).

²⁶ Training and encouragement of attorneys to represent detainees are crucial steps in providing legal counsel for inmates. While some attorneys may be able to donate their time to handle some of these cases pro bono, additional funding to support attorneys representing indigent detainees will almost certainly be required to provide sufficient access to representation. In the pilot project of the HHRPP, described briefly in *supra* note 24, the Institute for Justice and Democracy in Haiti (*Bureau des Avocats Internationaux*) reports that it “hired on-site lawyers at two of the three prisons” involved in the project. HHRPP, *supra* note 15, at 3. Of course, representation is only one of a number of reforms that are likely to be necessary to address the issues surrounding detention of individuals in Haiti’s prisons. HHRPP, which involves a partnership among legal and health organizations, more generally aims to address “prolonged pretrial detention and horrific prison conditions by systematizing the delivery of health and legal services to individual prisoners and advocating for broader, systemic reforms.” *Overview, Health and Human Rights in Prisons Project*, INSTITUTE FOR JUSTICE AND DEMOCRACY IN HAITI, <http://ijdh.org/projects/prisoners-rights#hhrpp-prisons> (last visited Oct. 13, 2012).

²⁷ *About ESCDROJ*, L’ÉCOLE SUPÉRIEURE CATHOLIQUE DE DROIT DE JÉRÉMIE, <http://escdroj.org/About.html> (last visited Oct. 13, 2012) (“ESCDROJ was created to help build a society where the rule of law can be enforced, where justice may flourish, and where peace may be enjoyed. We envisioned our law school as a place for those who want to become servants of law and justice, regardless of religion, gender, social, economic or political backgrounds.”).

²⁸ *Id.*

²⁹ In addition to the successful completion of classes, to practice as an attorney in Haiti, generally students must complete both a “memoire,” which resembles a thesis, and a “stage” or apprenticeship in a court or law office. The “stage” appears to differ from a typical U.S. law school externship experience in that it occurs following law school and without academic supervision. *See supra* note 24.

³⁰ *See generally* AM. BAR ASS’N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUC. AND PROF’L DEV.: AN EDUC. CONTINUUM (July 1992); *see also* N.

program to provide the theoretical, doctrinal, and practical training to help students embark on criminal representation of the underserved jail population. The law school might employ a live-client clinic, in particular, to enable students to experience such representation.³¹ But, as succinctly explained by Dr. Jomanas Eustache, Dean of ESCDROJ, “these kinds of clinical training opportunities do not currently exist in Haiti.”³²

Pioneers at ESCDROJ aim to change that. To do so, Dr. Eustache and members of the ESCDROJ community have engaged in a variety of efforts to enhance the focus on practical experiential legal education in Haiti. Among these efforts, they have sought to import some of the information and experience from U.S. clinical programs. For example, they have reached out to encourage U.S. law schools that partner with ESCDROJ to share U.S. clinical teaching approaches with aspiring lawyers-to-be in Haiti. As part of these efforts, members of the Hastings-to-Haiti Partnership (HHP)—a long-standing partnership between the University of California, Hastings College of the Law, and ESCDROJ—have participated in creating and teaching sample clinical criminal simulation modules.³³ More directly, ESCDROJ is in the midst of attempting to create its own

William Hines, *Ten Major Changes in Legal Education Over the Past 25 Years*, THE ASS'N OF AM. LAW SCH., http://www.aals.org/services_newsletter_presNov05.php (last visited Oct. 13, 2012) (“The recent ABA report on curriculum changes between 1992 and 2002 notes that one pronounced trend has been the growth in opportunities for students to gain practical experiences in representing clients within supervised clinical settings and the proliferation of courses emphasizing discrete professional skills, such as factual investigation, interviewing, counseling, negotiation, mediation, and litigation—the core agenda of the McCrate Report.”).

³¹ An extensive body of scholarship exists on clinical andragogy/pedagogy in legal education. See, e.g., Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Legal Education for this Millennium: The Third Wave*, 7 CLINICAL L. REV. 1 (2000); GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978).

³² Eustache, *supra* note 24, at 607; see also Brian Concannon, Jr., *The Bureau des Avocats Internationaux, a Victim-Centered Approach*, in EFFECTIVE STRATEGIES FOR PROTECTING HUMAN RIGHTS 239 (Barnhizer ed., 2001) (“Law School in Haiti is theoretical, with no practice classes or clinics.”).

³³ As one of several partnerships between ESCDROJ and U.S. law schools, HHP’s work is just one of a number of U.S. law school collaborations with legal educators in Jérémie. At least three U.S. law schools, in addition to UC Hastings College of the Law, enjoy educational partnerships with ESCDROJ, including Catholic University of America, Columbus School of Law, Florida International University College of Law, and Seton Hall University School of Law. See *Partners & Projects*, L’ÉCOLE SUPÉRIEURE CATHOLIQUE DE DROIT DE JÉRÉMIE, <http://escdroj.org/partners&projects.html> (last visited Oct. 14, 2012).

criminal justice clinic in Jérémie.³⁴ The hope and expectation is that “[o]nce fully operational, the Clinic will help to reduce significantly the overcrowding of the jail in Jérémie.”³⁵

This Article explores and reflects on the experience of the Hastings-to-Haiti Partnership in designing and teaching two criminal justice simulation modules, one in 2009 and one in 2011, with the collaborative and invaluable engagement, advice, and support of our ESCDROJ colleagues. This simulation project aims to contribute to the larger endeavor of fueling practical legal training in Haiti’s law school curriculum, as well as furnishing more immediate education about practical legal skills for students who might represent detainees in the Haitian prison system in Jérémie through the hoped-for criminal justice clinic and in their future practices.

It is important to note, before proceeding to a discussion and evaluation of this aspect of the UC Hastings and ESCDROJ exchange, that, although the members of the UC Hastings contingent were the primary presenters of material for these clinical modules, the exchange is a bi-directional one. The partnership engages students,

³⁴ Eustache, *supra* note 24, at 606–07 (“In the near future, ESCDROJ hopes to start a law clinic in order to provide both clinical training for our students and assistance to those in our community and who need representation. Currently, after passing a pre-memoir at the completion of their second year, students may represent individuals before the local court. However, by having a clinic, we could more effectively train our students in a manner that combines advocacy with a strong commitment to serve those who cannot afford justice. Students would then have the necessary tools to sharpen their legal advocacy skills. The need is great because these kinds of clinical training opportunities do not currently exist in Haiti.” (footnotes omitted)); *see also Partners & Projects*, *supra* note 33 (“ESCDROJ is currently working to establish Groupe de Recherche, d’Analyse et d’Assistance Légale, the first law school affiliated Criminal Justice Clinic to serve the Grand’Anse region of Haiti. The clinic will increase access to quality legal representation for indigent defendants, provide for private mediation to resolve disputes before they ripen into criminal charges, inform the citizenry about their rights and responsibilities under the rule of law, and train and deploy a new class of lawyers dedicated to social justice. It will also serve as a model that can be replicated in other law schools of Haiti to increase high quality legal representation for those charged with crimes who currently are unrepresented, and often forgotten, in Haiti’s criminal justice system.”); *Law and Social Justice Initiatives*, THE CATHOLIC UNIVERSITY OF AMERICA (June 20, 2012), <http://lsji.law.edu/cuahaiti.cfm>. As part of the effort to initiate a criminal justice clinic, clinicians in the United States at Catholic University of America, Columbus School of Law hosted and worked with Roxane Dimanche, a pioneer in the efforts to found the Jérémie clinic, to provide information about U.S. clinical legal education. In January 2012, UC Hastings hosted Georges-Gabrielle Paul, a graduate of ESCDROJ, to support her efforts to help launch the Criminal Justice Clinic at ESCDROJ. Ms. Paul joined UC Hastings law students in attending an intensive accelerated class focused on preparing the U.S. law students for their externship experiences in local California prosecutors’ or public defenders’ offices.

³⁵ *Law and Social Justice Initiatives*, *supra* note 34.

alumni, and faculty from both institutions in presenting and sharing legal research, analysis, and information with each other. Moreover, the guidance, counsel, and practical support of our ESCDROJ colleagues were critical to the design and implementation of these two simulations.

Part I provides an overview of the creation and implementation of the first module. Part II surfaces and reflects upon some of the lessons from this foray into clinical legal educational modules in Haiti. In identifying these implications, Part II articulates several potential guideposts for international academics and practitioners providing curricular support for clinical legal education in Haiti and, perhaps, in other international contexts. Part III briefly addresses the second module and how we tried to follow those guideposts and apply those lessons.

Through this Article, I aim to provide a firsthand account and consequent analysis of one approach to developing and teaching criminal justice clinical legal educational modules in a Haitian law school. We hope that these simulation modules play at least a small part in helping to prepare and/or encouraging students to engage in criminal practice, and thus ultimately in addressing the urgent need for legal representation for detainees in Haitian prisons.³⁶ Research in the scholarly legal literature suggests that this is the first Article to furnish such an account and analysis as applied to Haiti.³⁷

³⁶ I use the term "we" often in this Article with the intent to credit my many wonderful colleagues involved in these simulations for the work and insights they contributed. But they may not share precisely my views, perspectives, or evaluative opinions. Consequently, please interpret the "we" as sharing credit, but not burdening my colleagues with my opinions.

³⁷ This research was conducted in a variety of scholarly legal literature sources available in English. This Article strives to supplement the existing collection of scholarly literature on global clinical legal education efforts. *See, e.g.*, THE GLOBAL CLINICAL MOVEMENT: EDUCATING LAWYERS FOR SOCIAL JUSTICE (Frank S. Bloch ed., 2011) (describing and reflecting upon facets of clinical legal education endeavors in a variety of countries around the world); BRANDT GOLDSTEIN, STORMING THE COURT: HOW A BAND OF YALE LAW STUDENTS SUE THE PRESIDENT AND WON (2005) (describing the work of Yale Lowenstein Clinic Law School students, Michael Ratner and Professor Harold Koh, among others, in representing Haitian detainees at Guantanamo Bay); Stacy Caplow, "Deport All the Students": *Lessons Learned in an X-Treme Clinic*, 13 CLINICAL L. REV. 633 (2006) (reviewing STORMING THE COURT); Scott L. Cummings & Louise G. Trubek, *Globalizing Public Interest Law*, 13 UCLA J. INT'L L. & FOREIGN AFF. 1, 38-39 (2008) ("In an effort to formalize global information exchange among progressive academics, the Global Alliance for Justice Education was founded in the late 1990s to facilitate the network of clinical and practice-oriented law school professors from around the world interested in promoting social justice pedagogy."); Lawrence M. Grosberg, *Clinical Education in Russia: "Da and Nyet,"* 7 CLINICAL L. REV. 469 (2001); Steven E. Hendrix,

I

CREATING AND IMPLEMENTING OUR FIRST SIMULATION MODULE

A. Developing the Module

In the fall of 2008, Dean Eustache gave a symposium presentation at UC Hastings in which he conveyed his hope that ESCDROJ would create its own criminal justice clinic.³⁸ Several months later, in the spring semester of 2009, as discussions got underway about what presentations might be of interest to our partners during the upcoming

Restructuring Legal Education in Guatemala: A Model for Law School Reform in Latin America?, 54 J. LEGAL EDUC. 597 (2004) (discussing law school reform, including reform of law school clinics in Guatemala); Grady Jessup, *Symbiotic Relations: Clinical Methodology—Fostering New Paradigms in African Legal Education*, 8 CLINICAL L. REV. 377 (2002); Peter A. Joy et al., *Building Clinical Legal Education Programs in a Country Without a Tradition of Graduate Professional Legal Education: Japan Educational Reform as a Case Study*, 13 CLINICAL L. REV. 417 (2006); Peggy Maisel, *Expanding and Sustaining Clinical Legal Education in Developing Countries: What We Can Learn from South Africa*, 30 FORDHAM INT'L L.J. 374 (2007) (reviewing obstacles faced by law school clinics and vehicles employed by clinicians for addressing them in South Africa); Peggy Maisel, *The Role of U.S. Law Faculty in Developing Countries: Striving for Effective Cross-Cultural Collaboration*, 14 CLINICAL L. REV. 465, 466 (2008) (offering a critique to “provide ideas to U.S. law faculty who undertake future visits abroad to insure that their efforts amount to effective cross-cultural collaborations as opposed to one-sided attempts to transfer American expertise.”); Melissa Gibson Swain & JoNel Newman, *Helping Haiti in the Wake of Disaster: Law Students as First Responders*, 6 INTERCULTURAL HUM. RTS. L. REV. 133 (2011) (discussing the efforts and aid provided by U.S. law school clinicians and their students in helping Haitians secure Temporary Protected Status in the wake of the January 2010 earthquake as part of the work of a law school clinic at the University of Miami School of Law); J.P. Ogilvy, *Compilation of Clinical Law Teachers with International Teaching or Consulting Experience*, 24–25 (Feb. 27, 2012), available at [http://www.law.edu/res/docs/INTERNATIONAL_TEACHING_Survey_rev02-27-12\(5\).pdf](http://www.law.edu/res/docs/INTERNATIONAL_TEACHING_Survey_rev02-27-12(5).pdf) (including two references to faculty who have taught or consulted in Haiti—the compiler, Professor Ogilvy, and Professor Jean Larosiliere of Northern Illinois); Leah Wortham, *Aiding Clinical Education Abroad: What Can Be Gained and the Learning Curve on How to Do So Effectively*, 12 CLINICAL L. REV. 615 (2006). Although Professor Larosiliere’s entry from a 1994–95 visit notes providing “training in investigative theory and technique, ethics, comparative law and criminal law,” neither entry reports teaching clinical simulations in a law school; Ala Hamoudi, *Toward a Rule of Law Society in Iraq: Introducing Clinical Legal Education into Iraq Law Schools*, 23 BERKELEY J. INT’L L. 112, 115 (2005) (recommending “introduction of clinical education methodologies” at Iraqi law schools but counseling against introduction of live client clinics at that time); see Rodney J. Uphoff, *Clinical Essay: Why In-House Live Client Clinics Won’t Work in Romania: Confessions of a Clinician Educator*, 6 CLINICAL L. REV. 315 (1999) (contending that “[g]iven the existing structure of Romanian education, the nature of the Romanian system, and the limited resources available to Romanian law schools, pedagogically sound in-house live client clinics are not feasible”); Richard J. Wilson, *Training for Justice: The Global Reach of Clinical Legal Education*, 22 PENN ST. INT’L L. REV. 421, 422 (2004) (providing an “overview of the development of clinical legal education outside of the [United States]”).

³⁸ Eustache, *supra* note 24, at 606–07.

annual voyage to Jérémie, ESCDROJ's interest in clinical legal education came to the fore.³⁹ And so, we began designing an experiential module to provide a window into some of the practical training emphasized in clinical approaches in the United States.

Clinical legal education may be defined in a variety of ways. But, in reviewing clinical education globally, one experienced clinician and scholar explains that "three elements stand out as constituting the most important commonly conceived notions of clinical legal education around the world: professional skills training, experiential learning, and instilling professional values of public responsibility and social justice."⁴⁰ This clinical educator describes "[c]linical legal education [as] bring[ing] a more realistic, from-the-ground-up perspective on law practice to students through the use of actual or simulated experiences as the primary teaching tool."⁴¹ Fortunately, the 2009 contingent of the HHP included several clinicians as well as students willing and eager to participate in a simulation demonstration. As the group was largely self-selected, it was a serendipitous coincidence that ours had substantial clinical leanings. Two faculty members, including the author, and two of the students assumed primary responsibility for creating and translating the first module.

1. On Which Skills Should the Module Focus?

As we began imagining an experiential module for export, we tried to ascertain what types of legal training might be of use in Haiti. We aimed, within resource constraints, to develop a criminal law module from the ground up that correlated to the reality that law students might experience defending a client on a criminal charge in Haiti. We received information from an ESCDROJ colleague that attorneys in

³⁹ In the spring semester of 2009, as is commonly the procedure, UC Hastings faculty members who planned to participate in the spring voyage to ESCDROJ were asked about topics on which they would feel comfortable presenting in Haiti. From among the variety of topics proposed, Roxane Dimanche selected several, including one about clinical legal education and one about criminal law practice. With the encouragement of Karen Musalo and Richard Boswell, and the advice and practical support of Roxane Dimanche and Jomanas Eustache, these evolved into the clinical criminal practice simulation of that March.

⁴⁰ Frank S. Bloch, *New Directions in Clinical Legal Education: Access to Justice and the Global Clinical Movement*, 28 WASH. U. J.L. & POL'Y 111, 121 (2008) ("These three elements interact, with varying degrees of emphasis, to form the core of a global conception of clinical legal education.").

⁴¹ *Id.* at 122.

Haiti can interview their clients and that they can chose whether to interview witnesses. From among the range of possible legal skills to include in our simulation, client and witness interviewing could be germane to Haitian criminal defense practice. Moreover, representation for prison detainees was urgently needed. For effective criminal legal representation in the United States, we perceived client interviewing as a prerequisite, as well as being a skill crucial to the early phases of criminal defense.⁴² In addition, client interviewing also represents a common, if not the most common, experiential preparation that live-client clinics offer at U.S. law schools.⁴³

Still, although client interviewing is available as part of the criminal defense attorney's role in Haiti, the Haitian legal system rests on a civil law, not a common law, approach.⁴⁴ A clinical colleague involved in international clinical legal education, particularly in civil law systems in Europe, opines that "the attorney-client relationship appears to be less important in the civil law system than in the common law system."⁴⁵ He maintains therefore that "a sophisticated understanding of interviewing and counseling techniques may actually be much less important in such a system."⁴⁶ This colleague cautions that "if U.S. clinical teachers, in our international collaborations, are not mindful of the crucial differences between the legal cultures of civil and common law societies, we risk promoting clinical program models that will not work in civil law systems."⁴⁷ This critique about recognizing differences between civil and common law systems generally is a significant one.

⁴² Having an attorney at an early stage of criminal proceedings has not, as Dr. Eustache indicates, been the practice in Haiti. See Eustache, *supra* note 24, at 609. But, early intervention may be possible with the anticipated clinic.

⁴³ Client interviewing also apparently appears as a staple in clinical legal education globally. See Bloch, *supra* note 40, at 122–23 ("Increasingly around the world one sees a common set of clinical courses on interviewing, negotiation, counseling, trial and appellate advocacy, and so on.").

⁴⁴ Eustache, *supra* note 24, at 602 ("Having not known another model of legal system and deprived of the necessary human resources to construct its own legal and judicial systems, Haiti's founding fathers inevitably adopted the French model of law commonly referred to as 'The Napoleonic Code.'").

⁴⁵ Professor Genty argues that, in civil law systems, "[t]he lawyer's duty to the court system trumps the duty to the client, and the lawyer is seen as presenting the client's case, without necessarily vouching for the client. Moreover, the client plays a limited role—if any—in the court proceedings, where written submissions predominate over live testimony." Philip M. Genty, *Overcoming Cultural Blindness in International Clinical Collaboration: The Divide Between Civil and Common Law Cultures and its Implications for Clinical Education*, 15 CLINICAL L. REV. 131, 150 (2008).

⁴⁶ *Id.*

⁴⁷ *Id.* at 149.

In Haiti, however, perhaps especially in contexts where human rights are at issue (which is arguably the situation for many detainees in Haitian prisons), there appears to be significant interest directed toward training lawyers in case preparation techniques and in an investment in the attorney-client relationship.⁴⁸ For example, the Bureau des Avocats Internationaux (BAI) in Port-au-Prince, which “is a group of lawyers [initially] funded by the Haitian government that assists the judiciary with human rights cases,”⁴⁹ emphasizes its “close collaboration”⁵⁰ with its clients, the victims of alleged human rights violations, whose civil cases often companion the criminal prosecution of the alleged perpetrator.⁵¹ This attorney-client collaboration, within the Haitian civil law system, includes meeting with, interviewing, and working extensively with clients.⁵² Brian Concannon, Jr., one of the attorneys who came to BAI early in its history,⁵³ explains that BAI “involves [their clients] as much as possible in strategic decisions, and work[s] with them to analyze the different obstacles to their case.”⁵⁴ In addition to representing victims in civil cases that companion criminal prosecutions, among other human rights representation, BAI is now also significantly involved in efforts to represent detainees in Haitian prisons.⁵⁵

48 Mr. Concannon explains that the “BAI is helping train a new generation of human rights lawyers through its programs for Haitian law graduates and U.S. law students.” Concannon, *supra* note 32, at 239. He opines that “[i]n our experience, the lack of trained lawyers willing and able to do high quality human rights or public interest work is the largest single problem with the justice system.” *Id.* Mr. Concannon maintains that “the main cause of this human resources problem is a training system that: a) does not train lawyers to prepare a quality, fact-based case, and b) perpetuates a legal culture that reinforces existing injustices.” *Id.*; see also *infra* notes 50–56 and accompanying text.

49 Concannon, *supra* note 32, at 233. According to BAI’s website, “since February 2004, it has received most of its support from the Institute for Justice & Democracy in Haiti (IJDH), and no support from any government or political organization.” *The Bureau des Avocats Internationaux*, INSTITUTE FOR JUSTICE & DEMOCRACY IN HAITI, http://ijdh.org/articles/article_bureau_internationaux.php (last visited Nov. 16, 2012).

50 Concannon, *supra* note 32, at 237.

51 As explained by Mr. Concannon, “[u]nder the French system used in Haiti, a claim for civil damages can piggy-back on a criminal prosecution. . . . The lawyer [for the victim] can introduce evidence and examine witnesses and parties at trial.” *Id.* at 235.

52 *Id.*

53 Mario Joseph is the attorney who currently manages BAI. See *Bureau des Avocats Internationaux*, *supra* note 49.

54 Concannon, *supra* note 32, at 235. In the concluding lines of the chapter on BAI’s victim-centered approach, he writes “[i]f the office can add three to six well trained public interest lawyers to the bar every year, it will change legal training and the way lawyers relate to their clients forever.” *Id.* at 241.

55 See *supra* notes 24 and 26, and accompanying text.

Relatedly, we have come to understand from an ESCDROJ colleague that sharing approaches that have not commonly been taught in the traditional law school curriculum (about, for example, fact investigation) is of interest in our presentations at ESCDROJ.⁵⁶ An interest in information about such approaches to legal training may stem at least in part from the widespread and substantial concerns that have been expressed about the judicial system in Haiti and the powerful desire for reform of that system.⁵⁷

Whether or how ESCDROJ faculty will encourage students to conduct client interviews or engage in fact investigation within their criminal justice clinic or more generally how students will perform such tasks when they practice within the Haitian civil law environment are decisions for the ESCDROJ faculty and students. What has become apparent is that our colleagues in Haiti are interested in having aspiring attorneys learn about approaches to engaging in a variety of lawyering skills, like the approaches commonly taught in U.S. clinical legal education. We thus could provide at least a window for comparison on what we believed were some options for best practices in U.S. representation, including attorney-client (and witness) interviewing. We began, then, to focus on client interviewing skills as the heart of our exportable module.

2. Assumptions About Client Interviewing: But, Does It Work That Way in the Haitian Criminal Justice System?

For this client-interviewing module, we concentrated initially on the need to establish rapport between the attorney and client. In our

⁵⁶ HHP notes of our planning discussion for the second simulation, for example, reflect our ESCDROJ colleague's expressed preference that we present approaches to lawyering skills that were not commonly covered. For example, our colleague emphasized the value of attorneys learning to engage in fact investigation, rather than deferring to the court report. Similarly, the notes indicate that our colleague explained that client and witness interviewing were not generally taught.

⁵⁷ For examples of that expressed concern, see, e.g., Eustache, *supra* note 24, at 607 ("[p]eople often witness cases where the justice system has failed to hold individuals accountable for their actions or where the protection of rights depended solely on an individual's ability to pay."); Concannon *supra* note 32, at 234 ("Justice in Haiti is often described with the word 'exclusion[]' the exclusion of the poor from the formal justice system, and the use of the system to exclude the poor from the country's economic, political and social spheres. . . . Lawyers were not adept at preparing cases for trial."); 2011 HUMAN RTS. REPORT: HAITI, *supra* note 7 ("Corruption and a lack of judicial oversight also severely hampered the functioning of the justice system. Many judicial officials charged varying 'fees' to initiate criminal prosecutions based on their perceptions of what a service should cost, and those who could not afford to pay often did not receive any services from prosecutorial or judicial authorities."). With respect to reform efforts specifically, see, e.g., *supra* notes 34, 48, and 54.

minds, the confidential nature of the relationship was key to building rapport. We considered how to explain various aspects of client interviewing approaches used in the United States. We imagined what types of information a lawyer might find useful in criminal proceedings in Haiti, and how an attorney might effectively elicit and respond to a client's needs and goals.

The modules we had created over the years for our own clinics relied upon our understanding of U.S. federal and state practices. In developing the interviewing module for Haiti, we assumed that attorneys in Haiti enjoyed a privilege of confidentiality in conversations with their clients. We also assumed, or perhaps did not even consider whether, there would be a place in the local prison where such a confidential interview could take place. With some frequency, and sometimes not until we arrived in Haiti, we found ourselves confronting these and other assumptions we had unwittingly made in our framework—assumptions that threatened to undermine the usefulness of the module we were creating.

Establishing rapport might, after all, look very different in a legal framework in which there is no attorney-client confidentiality. Without reassurances about confidentiality, why should a client confide personal, embarrassing, or potentially incriminating information in a complete stranger?⁵⁸ Client confidentiality is so much a part of the fabric of our living and breathing as lawyers and legal educators in the United States that we posited its existence at the center of our module, though we did not actually know if attorney-client confidentiality existed in Haiti. Fortunately, on this count, our assumption proved correct, as we learned from Roxane Dimanche and Dr. Eustache that Haitian clients do indeed enjoy confidentiality largely similar to the confidentiality that U.S. clients enjoy.⁵⁹ We were relieved, first because we value confidentiality in the lawyer-client relationship, and second, because the simulation we were about to deploy depended on it.

With respect to interview space, as you can perhaps infer from the description given earlier of the space constraints in the prison, our

⁵⁸ There are, of course, rationales for providing information to one's counsel even absent confidentiality, but confidentiality may be a prerequisite for some clients when the information is embarrassing, incriminating, or otherwise secret.

⁵⁹ See also *Le Code de Déontologie des Avocats: Règle IV*, LE JURISTE HAITIEN 2 (although this code is apparently a draft code, Dr. Eustache has emphasized to us that attorney-client confidentiality is viewed in Haiti as a crucial ingredient of the attorney-client relationship).

assumption proved incorrect. A private room allocated for client interviewing was not apparent in the prison plan. This practical reality left us to guess that attorneys and clients might confer in whispers in the open prison yard in an attempt to effectuate a confidential communication.

3. Resources

Creating experiential educational modules depends upon people and informational resources. When we create modules for our own clinics here in the United States, we have access to a wealth of resources written in English on virtually every aspect of criminal practice. Equivalent resources on the subject of day-to-day Haitian criminal practice, however, turned out to be somewhat scarce.⁶⁰ When we arrived, we found, for example, that the one-room law school library itself possessed only two softbound copies of the Haitian Penal Code.⁶¹ Internet access there was also limited and often unreliable. We had, however, previously located a version of the Haitian Penal Code available online in French, a great asset in a code-based system.⁶² As French remains the language in Haiti in which formal court proceedings generally transpire and legal education proceeds, we were lucky that our UC Hastings group also included several strong French speakers.⁶³ What our UC Hastings group often lacked was a clear understanding of the reality of practice, of cultural expectations and norms, of criminal procedure, and of evidentiary limitations as practiced in Haitian courts.

Thus, in order to develop a workable module, we needed to rely upon our colleagues at ESCDROJ—academics and law school graduates who were professionally familiar with Haitian criminal

⁶⁰ There are, however, some very useful reports and descriptions in English by various organizations that do furnish insight into the criminal justice system. *See, e.g.*, 2009, 2010 & 2011 HUMAN RIGHTS REPORTS: HAITI, *supra* note 7; HHRPP, *supra* note 15.

⁶¹ The library contained other books as well, but I recall seeing only two copies of the Haitian Penal Code.

⁶² *See* Código Penal de Haiti [Penal Code of Haiti], available at http://www.wipo.int/wipolex/en/text.jsp?file_id=200018&tab=2 (last visited Oct. 13, 2012).

⁶³ While French is the language taught at school and used by many government officials, Haitian Kreyol (Creole) is the language spoken daily by the vast majority of the population. Estimates vary on the percentage of Haitians who speak French fluently, with five to twenty percent being the common range. *See, e.g.*, Cordelia Hebblethwaite, *Should Creole Replace French in Haiti's Schools?*, BBC NEWS (Aug. 23, 2011), <http://www.bbc.co.uk/news/world-latin-america-14534703> (estimating that five percent of Haitians speak fluent French).

legal practice.⁶⁴ The UC Hastings contingent came in with lots of enthusiasm, substantial cumulative clinical legal teaching experience, and a firm grasp of various aspects of U.S. law; but also, no doubt, some naiveté about local practice and conditions. We were saved from countless errors by the partnership and counsel of our colleagues at ESCDROJ. But even with their help, a workable module depended upon our recognizing the topics about which we needed to make inquiry, such as our blind assumptions about confidentiality and a private space for a client interview. And, some of the process also depended on a bit of good luck.

4. Trying to Respect Cultural Norms and Create a Simulation with Verisimilitude and Andragogical Integrity

Having decided on client interviewing, at least U.S.-style interviewing, and a collection of related skills that we sought to present, we then needed to create a mock criminal case as the setting for the attorney-client interactions. Although our goal was to share approaches to U.S.-style interviewing, we sought to place those skills and ethical precepts in a context that approximated a criminal case that students might see in Haiti. What crimes were prosecuted in Haiti? After all, simply looking at the codebook itself does not tell one how often, or even whether, a particular crime is or will actually be prosecuted. It also does not effectively answer the question of which crime would provide a culturally appropriate base for our simulation. Input from our hosts would be crucial to enhance the verisimilitude of the simulation and hopefully prevent us from committing cultural faux pas, or generally embarrassing ourselves with our ignorance of the Haitian justice system.

To help us prepare, Roxane Dimanche, a highly respected law school graduate who is playing a central role in the efforts to launch the new clinic,⁶⁵ kindly located and e-mailed us a copy of the court papers for a criminal case of alleged arson in the Jérémie courts.⁶⁶

⁶⁴ Julie A. Davies, *Methods of Experiential Education: Context, Transferability and Resources*, 22 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 21, 22–23 (2009) (“Experiences with exporting U.S. legal education methods to the rest of the world have shown, time and again, the importance of understanding the context in which those methods will be used.”).

⁶⁵ See 2010–2011 *Course Catalogue*, L’ÉCOLE SUPÉRIEURE CATHOLIQUE DE DROIT DE JÉRÉMIE, <http://escdroj.org/faculty.html> (last visited Oct. 13, 2012). Roxane Dimanche is listed as the Legal Clinic Director.

⁶⁶ Roxane Dimanche e-mailed us the court papers from two different cases, one of which served as the inspiration for the simulation.

They were in French and often hand-written in cursive script—a challenge to decipher through sometimes fuzzy scans and translation of unfamiliar terms.⁶⁷ But the papers furnished highly useful insights into the reality of criminal charging and police fact-finding in Haiti in at least this one criminal arson case. We then researched the elements of arson in the Haitian Penal Code and accordingly framed our simulation based on an arson charge.

With the offense in mind, we considered more carefully our pedagogical⁶⁸ goals for the client interview. We contemplated what the fundamental skills associated with successful interviewing in the United States were, and what made some client interviews challenging. We brainstormed and consulted resource materials that opined on client interviewing.⁶⁹ This led us to the view that it would be valuable to have our mock-case client lie, at least in the initial interview. Successfully interviewing a truthful trusting client who is accurate and forthcoming in his account is rarely a challenge to an interviewer. But a client who has something to hide, a client who is not forthcoming—that person is a client for whose interview we might provide some useful strategies.

Thus, we began to construct the scenario. It would involve an arson and a client who lied during the initial interview. It would be an arson of a farmhouse inherited by the accused and his sister. We supplied a motive for the client to have caused the fire and consequent destruction of the farmhouse. The motive lay in a disagreement between the sister and the client about the appropriate use of the land. The sister wanted to farm the land. The client wanted to sell it and split the proceeds. The accused was allegedly heard to say: “I’d rather see the place burn to the ground than have you continue living there and waste the money it’s worth.” We invented an eyewitness and set the event for dusk. We gave the accused a lie—a false alibi. He was to say that he had spent the evening with his wife, when, in fact, he had not.

Then we wanted to give him information that he could reluctantly reveal to his attorney in a second interview, if the attorney followed

⁶⁷ Roxane Dimanche also graciously sent us some word-processed materials on the case that she had prepared for the court. These materials were entirely legible.

⁶⁸ Although the technically correct term for teaching adults is andragogy, pedagogy also seems to be used with great frequency. I use the two terms interchangeably in this Article.

⁶⁹ See, e.g., ANTHONY G. AMSTERDAM, AM. LAW INST., TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES (1988); CALIFORNIA CRIMINAL LAW PROCEDURE AND PRACTICE (Continuing Education of the Bar, 2008).

the principles that we believed were important in effective interviewing. We sought to invent something of a private nature, a relationship about which the accused might not feel comfortable telling a stranger. We proposed an affair with a woman who worked in the same town. When we consulted those familiar with cultural mores in Haiti, however, we were informed that the extramarital relations might not necessarily provoke hesitation in disclosure. We suggested instead the possibility of an extramarital gay liaison for the client, in lieu of a heterosexual extramarital affair. We thought perhaps our client, as a man married to a woman, might be more reticent about a same-sex extramarital affair. With this, we discovered we had crossed into the realm of the taboo. Views on homosexuality were so charged that we were strongly advised to steer clear of the issue entirely.

This advice and some of the responses we were told to expect if we made reference to homosexuality were disconcerting. We considered whether we should defer to the advice. A number of us were inclined to incorporate the gay affair into the module and engage with the issues raised. But we ultimately concluded that, as invited guests, our just-over three evenings of class supplied too constrained a forum to take on this subject in an effective way with over 100 students, in French, and with translation required for a fair contingent of our delegation. It was also true that members of a delegation some years earlier had given a presentation on gay marriage, and their presentation had met with a number of highly negative responses. Thus, out of respect to our hosts and our other advisors, and because we believed that including a gay extramarital affair could become the focus of the exercise rather than an explanation of the accused's initial falsehood, we returned to the existence of a heterosexual affair as the motivation for the lie and invented specific (and hopefully persuasive) reasons why the accused's wife would be especially disturbed by this affair and, consequently, why the accused would fail to reveal its existence at the initial interview.

B. Logistics and Implementation: Would the Ceiling Fall?

The scenario we created was born with the crime alleged in the court papers that Roxane Dimanche had sent us. But, as most clinicians recognize, when developing materials to meet specific pedagogical goals, substantial modification of real cases is often necessary. Thus, we relied on the crime alleged, but designed the simulation to enable students to acquire and practice skills that, at

least in the United States, we believed were crucial to effective client interviews.

We built the module to incorporate a triad approach to learning. The three pivotal learning elements for this paradigm are: (1) an anchor or framing presentation; (2) experiential components, hands-on participatory opportunities to apply the principles furnished in the anchor presentation; and (3) a demonstration of the principles applied as an example, perhaps a model, for students. In an ideal environment, each of the three elements also incorporates opportunities for students to inquire, respond, and reflect on the learning. Of these, often the most important reflective opportunity arrives at the conclusion, depending on the extent of earlier opportunities to reflect, with an end-of-exercise debriefing to elicit students' understanding of the learning and their processing of the exercise.

And so, one March evening, just before dusk and the time when the mosquitoes descended in force on our exposed skin, we began. It would be inaccurate to call the space at the law school in which we taught a room, in the sense of a space having four walls. We were conducting class in a hallway, entirely open to the outdoors at one end. We were there in the hallway because the ceiling of the school's large outdoor classroom space was poised to collapse, even in pre-earthquake 2009. None of the Haitian students seemed fazed by this. Attentive, engaged, but accustomed to lecture, these students were about to embark on a foray into a U.S.-style clinical client interviewing learning adventure.

In our application of the triad approach, the frame or anchor presentation came first. We presented it in the form of a straightforward discussion on general principles about client interviewing in the United States. It focused on several primary tenets. Perhaps foremost among these was, of course, the importance of—and corresponding potential techniques for—establishing rapport. After all, rapport increases the likelihood of achieving other aims, like obtaining relevant facts, ascertaining the client's goals, etcetera.

Within the essential principle of rapport, we spoke, for example, of reassuring the client of confidentiality and inquiring what the attorney might do to help the client. We learned that what an inmate in Jérémie might need, in addition to some of the legal services that we might be accustomed to attorneys performing in the United States, involved much more basic needs. Apparently, for example, inmates sometimes

lacked access to adequate food.⁷⁰ We could imagine an attorney working to arrange with a client's family to provide such necessities.

Among other principles, we also discussed the significance of ascertaining the client's goals and helping the client understand the attorney's role and the process, to the extent the process was predictable, and, of course, providing the attorney with information about the case.

We tried to include at least a brief opportunity for questions and to respond and reflect at various phases of the learning exercise. We felt it was of particular importance to include responsive opportunities as we understood that our simulation stood in stark contrast to the traditional teaching formats used at the law school. In a world in which lecture and formal presentations were *de rigueur*, we were about to ask students to learn by doing, to brainstorm in small groups, and to conduct client interviews.

I should perhaps add that we had been alerted by one of our very knowledgeable hosts that lawyers in Haiti sometimes entertain a certain determined skepticism about the likely truthfulness of their clients' narratives in criminal cases. In our simulation, the client was supposed to lie in the initial interview, consistent with this skepticism, but was factually innocent of the crime charged. Thus, we hoped that our simulation would challenge the students to reach beyond the initial lie and their potential skepticism to attain a level of rapport to get to the truthful evidence supporting innocence.

Following the anchor presentation, we hustled students off to brainstorm about how they might apply the general principles and to prepare to actually conduct the initial client interview. We had produced a preliminary narrative police report that supplied basic information about the case and translated it into French (an English copy of which appears in Appendix A). The ten-plus small groups buzzed with intense discussion and preparations for the interview.⁷¹

⁷⁰ HHRPP, *supra* note 15, at 6 ("[T]he lack of adequate food in prisons forces families to spend precious time and money delivering their own food to the imprisoned."); Lopez, *supra* note 9, at 2 ("Sometimes there are delays with government funding and the prison [in Jérémie] is unable to buy food. During those times, the warden says that he does whatever he can to make sure the prisoners have enough to eat. This has occurred three or four times in the last two years.").

⁷¹ We had confronted a choice in terms of pedagogical approaches. In the triad model, often the anchor and the demonstration precede the student's hands-on component. But here, due to logistical constraints on timing and the specific dynamics of having the client lie about his wife as the alibi in the first interview, we chose to plan for the students to have their first of the hands-on experiences after we explained the general principles, but

For the hundred-plus students, the entire law school student population, to have a small-group experience conducting the interviews, almost every member of our UC Hastings contingent was needed to play the role of the client. We sent French speaking members in on their own and matched non-French speakers with translators. The ESCDROJ students and alumni were very generous in their willingness to translate. In sum, we were able to staff about twelve small groups. This resulted in approximately ten to fifteen ESCDROJ students per small group—larger than would be ideal—but far better than one group of a hundred-plus. After fifteen to twenty minute student-as-lawyer brainstorming sessions by the Haitian students without the client, the client arrived in each small group. This type of client interviewing role-playing exercise serves as the bread and butter of clinical and simulation modules in the United States. We looked forward to and anticipated hearing, as one might expect in the United States, a variety of outcomes from this initial effort to apply the principles we had outlined for effective U.S. client interviewing.

Once the clients were ensconced in each space or room with their attorneys, I circulated to check the pulse of the interactions, aiming to help with logistical and/or translation issues. The exchanges were animated; voices were raised. The energy levels were running high on this sweltering evening in coastal Haiti. Students were engaged. I passed quickly from one group to the next with limited opportunity to garner a sense of whether rapport developed. I was pleased, though, to see genuine and energetic engagement in our clinical pedagogy.

Some twenty or thirty minutes after they had initially joined their attorneys, the members of our delegation emerged. They looked discomfited. When they shared their experiences as clients, we were crestfallen. Rapport had generally not developed. With perhaps one or two exceptions, our delegation members reported that, although varying by small group, collectively: (1) they had been accused by their attorneys of committing the arson, (2) they had been treated like hostile witnesses, (3) they had been encouraged to lie, and/or (4) they had been told that they were guilty and that therefore the students would not represent them. In addition, in some of the groups, students had made extravagant guarantees that they would get their clients released.⁷² Although the buckling concrete hadn't moved from its

before we offered any demonstration of the principles applied or of interviewing more generally.

⁷² With allegations of judicial corruption common in Haiti, *see supra* note 57, perhaps

precarious perch above the outdoor classroom, in a figurative sense, the ceiling had fallen.

Had I failed to effectively convey or persuade students of the importance or methods of establishing rapport in the anchor talk? Did our module design, in which no matter the excellence of the rapport, the client was going to lie and be evasive in the first interview, condemn the interviews to failure? Were we simply expecting too much after only a single anchor discussion of client interviewing with students who had never interviewed a client before?⁷³ How could we repair, recover, and translate this unexpected result into a useful learning opportunity? Somehow we had arrived hoping to create teachable moments for our Haitian students. Instead, they had created a powerful teachable moment for us.

We stepped back and reflected, albeit briefly, during a hurried "break," on how and whether we might or should convey the failure to establish rapport, the risk of extravagant promises, and the importance and role of representing the guilty (even though, if they succeeded in their subsequent interviewing efforts, this client was factually and legally innocent). After some brief chaos and then some intense rapid-fire brainstorming on the delegation's part, we determined to supply feedback directly from the clients to the reconvened student body, in hopes that this would be an effective platform for processing the initial interview and helping students revise their interview approaches. Thus, the clients stood in front of the now reassembled student body of over 100 students and each client shared his or her impressions as the client in a two-minute or so summary. Typically, each client began with positive comments, but then generally moved to how he or she had not perceived an empathetic environment in the interview, and to specifically enumerate the types of remarks and approaches that had resulted in the perception that perhaps the clients had just undergone an adversarial style cross-examination by the prosecutor, rather than having been engaged in an initial rapport-building interview with their own defense counsel.

We realized that this approach held risks. Would students reject what we had to offer because our constructive criticism was so direct?

some students anticipated that sufficient funds might indeed result in their client's release.

⁷³ Perhaps, different roles of attorneys in civil and common law systems and the possible implications of those differences on client interviewing also contributed to the result we experienced. *See Genty, supra* note 45, at 150.

Would students find our approach just inapposite to interviewing clients in Haiti? Would students just stop being willing to play? After all, simulations rely on the good will of the participants. If participants feel that their time is being wasted, they are not learning, or they are not being appropriately valued, then the simulation is generally doomed.

After furnishing this direct feedback, we asked what steps they, as the attorneys for the accused, would take next in the case. We had set the problem up so that the accused would present his wife as alibi (the lie) in that first interview. This was designed to provoke students into doing some additional fact gathering by seeking to interview the client's wife. Fortunately, students did express the desire to interview the accused's wife.

In response, we then engaged in a demonstration witness interview, conducted by an experienced clinician as the interviewer, in front of the assembled student body. Following the demonstration, we processed with the students what they felt they had learned from this interview of the accused's wife. Of course, an interview of a witness differs from an interview of a client. In particular, it lacks the protection of attorney-client privilege. But, many of the other vehicles for establishing rapport are analogous. Substantively, the students astutely discerned from the interview of the client's wife that there were notable discrepancies between their client's and their client's wife's account of the events on the night of the arson. Students then suspected (or, for some of them, undoubtedly concluded) that indeed their client had lied to them in the initial interview.

This produced an interesting dynamic, especially in view of the largely antagonistic initial client interviews. Students who had perceived the client as evasive and a liar had their suspicions confirmed. Could they effectively establish rapport with a client they had alienated and/or who had alienated them, and whom they believed to be a liar? Despite the obstacles, students made clear their inclination to re-interview their client. Our class focus then became how to conduct this second interview with a client, who probably or certainly had lied to them and who probably or certainly felt alienated. What emerged was a discussion of the value of addressing the lie, but in the context of renewed attempts to establish rapport. We brainstormed ways to raise the issue while assuring the client we were on his side. We reaffirmed in particular the importance of discussing confidentiality. Then we once again hurried the students off to their small-group interviews.

The interviews commenced, and I anxiously swept from group to group to ascertain how the second interviews were proceeding. Was there less hostility toward the client and were fewer confrontational voices raised? Once the interviews concluded and our delegation members had had a chance to reconvene and recount the second interview dynamics, we discovered that the Haitian law students had managed an almost absolute about face. From accusatory and hostile to conciliatory and reassuring (especially about confidentiality), student groups had succeeded, almost without exception, in creating an environment in which the clients apparently felt comfortable revealing the true alibi, the mistress Lisette. The students now vociferously requested an interview of Lisette. They were, at least most of them, apparently willing to move beyond the client's initial lie to a place of enough trust to believe that the client had now revealed a truth that bore on his innocence and to insist upon an interview of this new alibi witness.

As we were approaching the final moments of our class time with the students of ESCDROJ, we conducted a speedy demonstration interview of Lisette, who was played by a faculty colleague on the delegation. Much to the delight of—and punctuated by many outbursts of laughter by—the students, Lisette confirmed the accused's true alibi. We engaged in a final and all-too-brief processing about take-aways from the exercise. And, to our delight (and, we hope, theirs), the students' genuine understanding of the principles we had discussed earlier in the week emerged. We celebrated their success.

Despite a very rocky start, and several bumps along the way, together as learners we had navigated our clinical legal education model and seen students acquire new, sometimes hard-won, understandings about lawyering skills of potential importance in both (as we learned) the United States and Haiti. A bright orange full moon had risen just beyond the edge of the chalkboard in our makeshift outdoor hallway of a classroom, a moon that we might be hard pressed to see as clearly from inside through the panes of glass in the classrooms at home.

II

WHAT WE LEARNED THAT MIGHT TRANSLATE TO OTHER INTERNATIONAL LEGAL CLINICAL ENDEAVORS: ROUGHLY HEWN GUIDEPOSTS

This section strives to provide some reflections on our first criminal practice simulation experience at ESCDROJ. Those of you who have exported or imported clinical educational modules internationally may find, as suggested in the literature on global clinical legal education,⁷⁴ that some of the lessons we take away resonate with your own experiences. For those who have yet to undertake a similar endeavor, we aim to suggest some guideposts drawn from our experience that might be useful.

A. Relying on Legal Academics/Practitioners On-Site and in Advance

For us, there was no substitute for the legal, cultural, and practical acumen brought to bear by Dr. Jomanas Eustache and Roxane Dimanche, the ESCDROJ Dean and the well-respected graduate who is helping to launch the criminal justice clinic, among others. In fact, the more the project grows from the ground up, from its sources in the goals, knowledge, and values of the host institution and legal culture, the more successful the experience is likely to be.⁷⁵ And, on the most

⁷⁴ The expanding scholarly literature on supporting clinical legal education abroad includes a number of discussions of “take-aways” or lessons learned. *See, e.g.*, Davies, *supra* note 64 (describing the importance of resources, context, and transferability in supporting and/or developing clinical legal education opportunities abroad); Wortham, *supra* note 37 (offering insights on the development of clinical programs abroad); *infra* notes 75 and 76.

⁷⁵ *See* Maisel, *The Role of U.S. Law Faculty*, *supra* note 37, at 490 (“The experiences described above [in her article] and the opinions expressed all indicate that the chances of successful international cross-cultural collaboration increase if U.S. scholars consulting overseas follow the lead of their hosts in establishing or modifying the goals and agenda for the project.”). Similarly, Professor Maisel argues that, among other considerations, “preparation” and a willingness and ability to adapt course materials to the local context, as well as a willingness to disclose a lack of knowledge about local practice, are important in successful clinical teaching abroad. *Id.* at 492–503; *see also* Jessup, *supra* note 37, at 380 (“Although the American experience is informative and may provide guidance to an African law school contemplating a clinical program, it is imperative that any attempt to incorporate a clinical experience into a current African law school curriculum take into account a cognizance of the political structure of governmental organizations and customary norms.” (footnotes omitted)); Pamela Phan, *Clinical Legal Education in China: In Pursuit of a Culture of Law and a Mission of Social Justice*, 8 YALE H.R. & DEV. L.J. 117, 140 (“In adapting the American clinical model to China’s needs, it is crucial to recognize that China is a civil law society in which judges regard themselves as civil servants.” (footnote omitted)).

basic level, HHP's collaborative efforts to develop and share U.S. clinical educational approaches with ESCDROJ emerged as a response to ESCDROJ's interest in information on such approaches.⁷⁶ Learning that there was attorney-client confidentiality proved fundamental to the simulation module we created. Being advised of the risks of making a homosexual liaison the reason for a client's lie enabled us to make informed choices.

If your existing clinical team does not include a local expert, communicating with and relying on local experts who can provide guidance on the myriad of issues crucial to a successful clinical simulation exercise stands as guidepost number one for us in exporting clinical legal education from the United States to Haiti and, I imagine, to many other locations around the world. Relying on a local expert supplements, of course, the basic research and preparation that one pursues through other avenues. Pursuing these other avenues may be especially important in order to limit the imposition on your local experts, especially in a locale where electricity and internet access are unreliable.

B. Unearthing Assumptions

What I would like to propose as the second guidepost is, of course, to recognize the assumptions underlying the materials created and the approaches planned. But, of course, the challenge is the difficulty in perceiving these assumptions. Nonetheless, questioning everything and having many eyes and ears focused on searching for bias and assumptions can be helpful. The ability to pool and contrast observations commonly increases the likelihood of revealing hidden and unwarranted assumptions and bias and getting a better grasp of both the details and how they fit into the bigger picture.

C. Acknowledging the Context-Specific Nature of Our Advice

We tried hard to do our pre-simulation research and gather intelligence about the Haitian system to create a simulation that law

⁷⁶ See Maisel, *The Role of U.S. Law Faculty*, *supra* note 37, at 471 ("A comparison of these efforts provides considerable guidance about how to initiate and plan a successful project, mainly the need to do so collaboratively with academics in the host country."); Genty, *supra* note 45, at 136 ("[T]he history of the Law and Development and subsequent movements, and the analysis of the ways in which legal systems are transplanted, indicate that successful international collaboration in legal education involves at least two elements: a subjective attention to issues of cultural sensitivity in transmitting ideas, and a practical attention to the utility of these ideas to the receiving 'host' country.").

students in Haiti would find relevant and coherent. But, we recognize that our efforts were far from perfect. For this reason and others, we presented our project to the Haitian students as being limited to portraying common approaches to U.S. interviewing.⁷⁷ Although we tried to contrast and address similarities and differences in U.S. and Haitian approaches when we felt reasonably confident that we understood them, we expressly attempted to confine our suggestions and educational pronouncements to practices in the United States.

I don't know that we entirely succeeded. It may be unrealistic to expect that a multi-hour investment by students in this simulation module as their first exposure to client interviewing, especially hands-on interviewing, was likely to remain confined to an interesting "oh, that's how attorneys do this in the U.S." If you have created a meaningful learning experience, students are likely to internalize, transpose, and apply what you bring to their future lawyering. Consequently, despite our disclaimers about the simulation's scope on site, it is helpful to work towards making as much of the simulation as possible consistent with the lived or anticipated experience of local lawyers.

Both in the immediate context of the module's U.S.-based approach to client interviewing and in the larger context of bringing a U.S. approach to clinical legal education to Haiti, we were cognizant of the risks of being or being perceived as imperialistic or

⁷⁷ Genty, *supra* note 45, at 148–49 (discussing the importance of recognizing differences between civil and common law systems in bringing clinical legal education models from common law to civil law systems). For a discussion of client interviewing in the context of differences between civil law and common law systems, see *supra* note 45 and accompanying text. Distinctions between civil and common law systems represent one of the important considerations in international clinical endeavors. Another, perhaps related, consideration stems from a possible preference for familiar clinical vehicles and approaches. For a discussion of potential risks associated with such a preference, see Michael William Dowdle, *Preserving Indigenous Paradigms in an Age of Globalization: Pragmatic Strategies for the Development of Clinical Legal Aid in China*, 24 FORDHAM INT'L L.J. 56, 56–57 (2000) ("But globalization can also inhibit access to justice and can do so in unexpected ways. This Essay uses the experiences of international efforts to promote clinical legal aid in China to explore one such unexpected consequence of globalization: international assistance's understandable focus on more familiar kinds of legal aid institutions and activities can unintentionally impede the development of indigenous legal aid practices and institutions that might ultimately be better suited for the particular domestic environment. In order to avoid this dynamic, international development projects need to shift their focus from one of simply replicating successful foreign models (what we will call a reductive strategy) to one of promoting discovery of the indigenous developmental implications and possibilities inherent in the domestic environment (what we will call a pragmatic strategy).").

ethnocentric.⁷⁸ We worked to avoid succumbing to these risks. To begin, our efforts to share the clinical legal educational world that we knew responded to our partner law school's, ESCDROJ's, interest in learning about clinical legal education. As part of the endeavor to support their previously announced goal of creating and staffing their own criminal justice clinic, our ESCDROJ colleagues have been seeking to learn about U.S. clinical educational approaches. Second, guidance from our hosts about local legal culture and practice played a significant role in the design of various facets of the simulation module. Third, although we did try to bring some of what we viewed as best practices in the United States, we hope that these approaches serve not as an end, but as a starting point for inquiry, critique, and exploration in the Haitian students' development of their own approaches to client interviewing and criminal practice, and that the experience encourages Haitian legal educators to design clinical curricula and teach the skills and related ethical precepts that they perceive as relevant to aspiring attorneys in the legal culture of Haiti.

D. Anticipating Pitfalls

Figure out the things on which you can certainly depend. Then, as in many adventures, assume that something will interfere with your calculations, and make back-up plans. I recall that, on at least one evening during the 2011 teaching adventure, the power failed. We waited in this huge open space in the dark. Luckily, either the general power returned or perhaps a generator kicked in and we continued. Fortunately, the back-up required here turned out to be just a bit of patience.

On a related front of planning to prevent pitfalls, making multiple copies was not pragmatic in a place with the extremely limited resources of ESCDROJ. If we wanted each student to have the opportunity and time to process the mock police report, we needed to

⁷⁸ For perspectives on legal imperialism in the context of exporting U.S. approaches to law and legal education, see, e.g., Francis G. Snyder, *The Failure of 'Law and Development,'* 1982 WIS. L. REV. 373 (1982) (reviewing James A. Gardner's book *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA*); Peggy Maisel, *The Role of U.S. Law Faculty,* *supra* note 37, at 473 (2008); Genty, *supra* note 45, at 135–36 (“[M]any of the efforts [of the Law and Development Movement] themselves, according to the critics, grew out of a form of legal ethnocentrism, i.e. a belief that desired social change would result from making the legal institutions in developing countries resemble those in the United States. This ethnocentrism was based on assumptions made without learning about the local context and without meaningful consultation with legal scholars in the host country.” (footnotes omitted)).

arrange to have it translated into French and copied for each student before we left the United States.

Even more than simply having the copies, we learned to carry them in the small bags we took as carry-on luggage. The flight from Port-au-Prince to Jérémie involves a very small plane with room for between perhaps sixteen and nineteen passengers. In 2009, with every seat occupied, those who make such decisions decided that most of our luggage would add too much weight for the plane to fly safely. So, they left much of our luggage behind at the domestic airport in Port-au-Prince. On our outbound flight from Port-au-Prince to Jérémie, we were there, flying above the Caribbean, clasping a few items like a change of clothes, our mosquito netting, and medications close to our persons, along with the requisite number of copies of the simulation.⁷⁹

E. Allowing a Bit of Chaos to Unfold, and, if Translation Is Necessary, Leaving Plenty of Time for That

It can prove propitious to allow a bit of chaos to unfold. Careful planning is essential. But sometimes creativity and genuine learning occur most effectively in spontaneous and unplanned ways as students experiment with role. It can help if you are willing to improvise and modify on the fly. This may be especially true if your teaching environment involves live on-the-spot translation as translation appeared to approximately double the time it took to engage with everything.

We had not adequately anticipated the students' struggle with the issue of rapport in the first interview. We are under the impression that our improvised response with direct feedback before the large group from each client was pivotal in turning around what boded to be a frustrating and potentially unsuccessful learning experience. But it required a quick rethinking of our carefully structured plan. And, it required taking a risk that students would not reject what we had to offer if we supplied a direct critique.

Upon reflection, we should not have been surprised or disappointed with the outcome of the initial client interviews. After all, it is supposed to be the experiential grappling with applying theory to practice that is at the heart of clinical education and student learning. This grappling is what we had observed in our students' learning back

⁷⁹ Fortunately, the remainder of our luggage did arrive in Jérémie about twenty-four hours later.

home. The process of trial and error, failure and mastery, is what clinicians invest countless hours helping our students in the United States access in a variety of clinical skills contexts. Somehow, here, with our condensed time frame and efforts at cross-cultural exchange, we had overlooked this wisdom underlying clinical legal education. In Haiti, as often elsewhere, the chance to fail and modify and retry was critical to genuine student learning. That was what happened here, and we are grateful that the Haitian students reminded us about how clinical legal education is supposed to work.

F. Trying to Decipher Cultural Taboos

As our experience with the possibility of including a gay affair demonstrated, it can be helpful to ask or otherwise try to decipher the local cultural boundaries. Then you can decide consciously if you want to challenge them and if so, how. Deciphering taboos is not always possible, of course, but it is certainly worth trying.

G. Garnering Good Will; Believing In, Supporting, and Celebrating the Students' Successes

Experiential learning exercises commonly depend, heavily, on the good will of the participants. Garnering that good will was a high priority in the implementation of our simulation. How to garner it—that was the question. The answer, of course, is as varied as the people making the attempt. We found that humor, clarity, and a belief that students can and will succeed in the exercise—along with an explicit request for, and explanation of, the importance of good will—worked well.

Humor across language and culture can sometimes be a bit risky. But, like in other contexts, often a modicum of self-deprecating humor can leap past cultural and language fences. For example, knowing how I struggle with my somewhat rusty French, it is safe for me to mention my anticipated grammatical errors, as it is extraordinary likely that any sustained effort by me to teach in French will produce some errors. It helps too, sometimes, to acknowledge the challenge of the undertaking for the students. We asked them to do something new, to engage in law school learning in a way that they may not have been expected to before. That they know that *we* know this is challenging can help, too.⁸⁰

⁸⁰ I am not sure that we did enough acknowledging of the challenge.

We also articulated and celebrated the students' successes. If they were mastering or progressing on some facets of interviewing, we praised them for the learning progress we perceived. As you know, when, in our view, they had failed to successfully implement aspects of effective interviewing practice, we had also been direct and (hopefully, gently) candid in our critique. Through this, we believe the students could discern that our praise was genuine.

H. Flexibility, the Silver Lining; Faith in the Value of the Clinical Education Process

Almost everything about the simulation took more time than we had expected. Being flexible helped keep us functional. It was disappointing to have to chop processing time by something like half. It is disappointing if, for instance, students who have to work in the outside-of-law-school world arrive late and miss part of the instructions or the anchor presentation. It is disappointing when you realize that even your careful and best-laid plans have indeed gone awry. But time and again, I see how lucky we were to be there in Haiti, introducing clinical legal education modules to students interested in public service—students who could make meaningful use of this knowledge, not by adopting it wholesale or even piecemeal, but by evaluating it and developing their own approaches to supporting the rule of law. Even if we could not orchestrate a flawless simulation, these students culled valuable information about their role as lawyers from our imperfect attempts to teach.

In the end, the simulation strengthened my faith in the clinical legal education model. Our application was rushed, our execution somewhat flawed and, at moments, a bit chaotic, but the triad model provided structure and nudged students toward an understanding of fundamentals of the attorney-client relationship in both cultures. It nudged us, too, toward a meaningful exchange about the role of the lawyer in Haiti and in the United States, about skills fundamental to interviewing an often frightened individual accused of crime, about the shared, international enterprise of upholding the rule of law in different cultures.

III

RETURNING AND TRYING TO APPLY THE GUIDEPOSTS: THE 2011 MODULE

This Article seems incomplete without at least an acknowledgement of the experience of our 2011 visit and our second

module. For this module, when we consulted Roxane Dimanche early in the planning process, she expressed a preference for a simulation based on fact investigation skills.⁸¹ We focused then on these and related client interviewing skills for the just-over two class sessions available during our visit.⁸²

We tried to implement the lessons we had learned in developing the first module. With respect to the first guidepost, we relied more extensively than before on our colleagues at ESCDROJ. In fact, Dr. Eustache visited Hastings in the month before we ventured to Haiti. We worked with him at length, reviewing much of the proposed second simulation line by line and revising our draft. We conferred and inquired and checked on legal limits and issues that attorneys in Haiti might raise. Similarly, we focused on deciphering taboos. We changed the alleged crime, but kept the reasons for a lie essentially unchanged. The accused still had a heterosexual love affair to hide.

We still failed to ask important things. Our simulation rested in part on an incorrect eyewitness identification. Apparently, it turns out that in Haiti, if the police report in the case is wrong, officials stop the trial of the accused and have a new trial on the validity of the police report. We learned this on the second of the three nights of conducting the simulation exercise in Jérémie. Because our simulation remained in the investigatory rather than trial phase, we managed to skirt this issue. If we had been pressed, we might have extemporized that it was the eyewitness, not the police, who had been mistaken. So, the report was not wrong, just the eyewitness's perception. We are not sure if that would have been adequate to solve the problem.

We had to be flexible and allow a bit of chaos to prevail. In this second module, we decided to engage in on-the-spot fact gathering. We waited until we were at the law school to select the location from which the eyewitness would claim to have seen the accused exit the crime scene. This means we could not finalize the eyewitness's

⁸¹ Criminal defense attorney fact finding in the civil law system in Haiti may depend upon many factors, including available resources, perspectives on and expectations of role, and at what point in the process counsel becomes involved in the case. Consider Dr. Eustache's concern about delayed representation. *See* Eustache, *supra* note 24, at 609 ("While the right to counsel is afforded to all citizens, court appointed counsel is generally only provided after the pretrial investigation is completed. In short, defendants are denied the right to legal advice during the most critical period of the proceedings.").

⁸² For a discussion of important considerations involved in designing clinical opportunities for civil law systems and the need to understand the differences between common law and civil law legal cultures, see Genty, *supra* note 45, at 134.

account until we were at the law school on the afternoon of the first day of the simulation, just a few hours before class. This was cutting it a bit close for my taste. But waiting to locate the eyewitness's vantage point meant we could actually invite students to walk the fifty or so feet to the law school gate and view the scene from pretty close to the eyewitness's alleged vantage point. The eyewitness had been adamant that the person hurrying from the scene of the crime ducked behind a tree. But, because we were able to select the location while standing at the proposed location in Jérémie, we could select a place that was visible from the law school and a place, as it turns out, where there are no trees in the area where the eyewitness claimed that the accused disappeared. For our simulation, this meant that the dozen or so student representatives who walked to the gate during the simulation exercise that evening could report that the eyewitness had to have been wrong. With the eyewitness wrong on this issue, the likelihood of the client's innocence increased.

We explicitly acknowledged the U.S. context-specific nature of our advice, but sought to make the case otherwise relatively realistic. As indicated above regarding incorrect information in the police report itself, we were not entirely successful.

Interestingly, in terms of the skills of client interviewing (and perhaps unrelated to our teaching), the students by and large conducted very well executed initial U.S.-style client interviews in the 2011 module. Somehow, unlike following the 2009 anchor presentation, following this anchor presentation (also given by me and largely dependent on the same basic set of notes as the original anchor), students connected to the principles we lauded for client interviewing. I wonder if the fact gathering about the eyewitness's error, which preceded the initial interview, gave students more confidence in the potential innocence of their client in this year's scenario. (Although, in 2011, the case involved the theft of a cell phone, and the phone is found by the police in the defendant's home under his bed.) In most of the small groups, students applied the principles beautifully. They used effective techniques and established rapport; they reassured the client of confidentiality; and they inquired astutely about alibi and factual assertions in the police report.⁸³

Apart from the speculation that the initial on-the-spot fact gathering about the eyewitness's story may have enhanced the client's

⁸³ With less trial and error on the part of the students, and much more initial success, as a clinician, I cannot help but wonder if this clinical experience was somehow less effective than the one in 2009.

credibility, I do not know why this group of students acclimated so quickly to the interview norms we articulated for client interviewing simulation exercises in the United States. I would like to speculate that the students who had participated in our simulation of two years earlier had recalled these norms and they surfaced in this similar exercise and guided the seven to nine student small group interviews. All right, so maybe that's just wishful thinking.

In evaluating our experience from the 2011 trip, I might add another guidepost, the ninth for the list: develop meaningful ways for your host students to provide a critique of the approach you bring. I imagine it might have felt impolite to our hosts to furnish on-the-spot criticism of the methods we presented. But, apart from feedback there and later from Dr. Eustache and Roxane Dimanche, and very gracious on-the-spot feedback from our host students, we did not create a vehicle designed to provide significant critical feedback on the usefulness and pitfalls of our teaching from the intended recipients of our efforts.

Overall, the principles of the guideposts proved useful in our second simulation experience in Jérémie. As the partnership evolves, it will be valuable to find ways of soliciting meaningful critique from our host students about this new clinical facet of our shared international partnership. And I welcome your feedback so that we can improve our approach and identify additional guideposts for clinicians exporting and importing legal education with educational partners around the world.

CONCLUSION

This analysis of our efforts aims to add to the database of evaluations of clinical simulations shared internationally, as well as to encourage others to share and continue to share their clinical learning and teaching in legal environments around the globe.⁸⁴ I hope especially that legal educators at educational institutions for whom clinical legal education is novel will (continue to) engage in the conversation, both by providing critical feedback about the

⁸⁴ In her 2006 article on supporting clinical legal education abroad, Professor Wortham concludes with a "hope[] to inspire those who work in clinics . . . to find the time to report their experience." Wortham, *supra* note 37, at 681. This Article concludes by reaffirming and extending her call for the continued and additional sharing of reflections about global clinical legal education efforts, encouraging reflections on the development of clinics globally, as well as more generally on shared efforts in the development of clinical legal education curricula globally.

experiments of imported modules in their law schools and about their own endeavors in creating homegrown clinical educational curricula.⁸⁵ I also hope that the very modest efforts of the HHP in the context of clinical legal education described and evaluated here will encourage students in Haiti to undertake representation of individuals in Haitian jails to vindicate detainees' human rights, whether through the anticipated criminal justice clinic, or more generally when they graduate and become lawyers. I am grateful to have had the chance to learn so much from our Haitian partners about life, law, and legal education in Haiti and, often unwittingly, about myself.

⁸⁵ For a discussion of the growth and impact of clinical legal education in China and relationships with U.S. law schools and colleagues in those developments from the viewpoint of a Chinese legal educator, see Yanmin Cai, *Global Clinical Legal Education and International Partnerships: A Chinese Legal Educator's Perspective*, 26 MD. J. INT'L L. 159 (2011).

APPENDIX A

MOCK POLICE REPORT

Hastings to Haiti
Criminal Law Simulation File
March 2, 2009

Preliminary Report

One year ago, Jean and his sister Marie inherited a farmhouse and some land located on the outskirts of Jabricot. The land and home had belonged to their grandparents, who had passed away. Neighbors understood there was some argument about the property. Marie wanted to live in the home and farm on the land, keeping the traditional uses of the property. On the other hand, Jean, whose wife was desperately unhappy in Jabricot, wanted to sell the entire inheritance and split the proceeds with Marie. Neighbors think Jean wants to immigrate to Miami, Florida with his wife so they can start a new life. He needs money to do all the paperwork.

One week ago, when Jean, Marie, and Jean's wife (Claudine) were eating in Chez Matou restaurant, a heated argument ensued between Jean and Marie about their inheritance. Jean was heard to say, "I'd rather see the place burn to the ground than have you continue living there and waste the money it's worth."

Two days ago, just after dark, the farmhouse burned to the ground and some of the crops were also destroyed. Marie was not injured. Coincidentally, the fire was set during the time that Marie was at the regular church service she attends.

In their investigation, the police found burned wood and rags soaked in kerosene around the perimeter of the farmhouse.

One person (Guillaume Dupres), who had been walking by the farmhouse claimed to have seen someone on the property just before it had been torched. Although the sun was setting, Mr. Dupres described the person he saw as about 170 cm tall, of slight build, and wearing work boots. Mr. Dupres did not get a good look at the person's face.

Yesterday, the police arrested Jean Mars and charged him with the crime of arson of the farmhouse.

Student Instructions for Class

Accused: Jean Mars
Offense Charged: Arson
Defense Counsel: Jérémie Law Students

This morning, you were given the above preliminary report and assigned to represent Jean Mars through the Criminal Justice Clinic at the Law School. You will have an opportunity to interview your client sometime in the next week.

To prepare, you should research the elements of the crime of arson. Please write down the elements and bring these to our first case meeting (in class).

Please also think about what you'd like to ask Jean Mars when you have the chance to meet him.